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# Supreme Court of the United States

OCTOBER TERM, 1931.

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ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, *Petitioner,*

v. No. 674

EFFIE K. SIMPSON, as ADMINISTRATRIX OF THE ESTATE OF A. E. SIMPSON, DECEASED, *Respondent.*

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## SUPPLEMENTAL BRIEF FOR RESPONDENT

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FRANK PACE,
*Counsel for Respondent.*

DEMOCRAT P. & L. CO., LITTLE ROCK

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In the brief for respondent in opposition to the petition for writ of certiorari, we answered the arguments made by opposing counsel in their brief in support of said petition; and, as we understand the briefs in support of the petition and our brief in opposition thereto will be considered by the court when the case is presented on its merits, we will stand upon our said brief in opposition to said petition as our answer to the arguments made in the original brief in support of the petition. But counsel filed a "reply brief of petitioner," and, as we have had no previous opportunity to answer the new arguments in said reply brief, and as counsel for petitioner have not filed any other or

supplemental brief since the writ was granted, we will, in this supplemental brief for respondent, answer the arguments made by counsel in the reply brief of petitioner, referring the court to the brief for respondent in opposition to the petition for the writ of certiorari for answer to all other arguments that have been advanced on behalf of petitioner.

On page 3 of said reply brief, counsel say:

> "Had the conductor stopped his train he could not thereby stop on-coming train 18 which, after making the curve, came into collision with the conductor's train. The stopping of one train would not stop the other, and it cannot be fairly said that the collision would have been avoided had Simpson's train been stopped by the conductor's applying the brakes when requested by the brakeman."

The undisputed evidence is that from the point where the engine of the south-bound train, of which Conductor DeMaine was in charge, would have been stopped had he pulled the air, or permitted Brakeman Dorman to pull it, when Dorman and Craig urged him to do so, to the point where the collision occurred was "a little more than half a mile," and that there was an "open view" throughout all that distance (R. 29, 51, 55, 57). The two trains were about the same size, each containing 43 or 44 cars (R. 45, 54). Either could have been stopped in 12 or 14 car lengths (R. 29). If Conductor DeMaine had stopped his train when Brakeman Dorman urged him to do so, the engineer and fireman on train No. 18 would have seen it when they came round the curve, more than half a mile away on

a straight, open track, and, of course, would have stopped their train as soon as possible, and, as they could have stopped it in 12 or 14 car lengths, or 500 or 600 feet (R. 29), there would have been a distance of more than 2,000 feet between the two trains when thus stopped, and the collision would have been avoided.

Counsel next say, on pages 4 and 5, that "recovery should have been denied because it was not shown the conductor discovered the peril in time to stop the train and avoid the collision." In answer to this contention of counsel we say, first, that, under the doctrine of the last clear chance, as that doctrine has been defined by this court, *actual knowledge* of the peril need not be shown, it being sufficient to show that the defendant either became aware of the plaintiff's peril, or that he had a reasonable opportunity to become aware of the plaintiff's peril, in time to have avoided the injury by making reasonable use of the means available to him, and that the defendant failed to make reasonable use of the means at his command to avoid the injury, after either actually becoming aware of the plaintiff's peril, or having reasonable opportunity to become aware of it; and, secondly, we say that the evidence in this case amply proves that Conductor DeMaine actually discovered the peril of Engineer Simpson in time to have avoided the fatal collision, had he made reasonable use of the means at his command after the peril was brought to his attention.

In support of the proposition that actual knowledge of the peril is not necessary to establish liability

under the doctrine of the last clear chance, but that it is enough to prove the defendant would have discovered the peril and avoided the injury had he exercised reasonable care to do so, we quote from the opinion of this court in *Kansas City Southern Ry. Co.* v. *Ellzey*, 275 U. S. 236, 241, as follows:

> "This language suggests that the Circuit Court of Appeals thought this case to be governed by the doctrine of the last clear chance. That doctrine, rightly applied in the Chunn case, amounts to no more than this, that a negligent defendant will be held liable to a negligent plaintiff if the defendant, aware of the plaintiff's peril *or unaware of it only through carelessness*, had in fact a later opportunity than the plaintiff to avert an accident." (Italics ours.)

In the Ellzey case, *supra*, this court, referring further to the doctrine of the last clear chance, said:

> "The classic instance is that in which the plaintiff had improvidently left his animal tied in a roadway where it was injured by the defendant's negligent operation of his vehicle. *Davies* v. *Mann*, 10 M. & W., 546."

In *Davies* v. *Mann*, thus referred to by this court as "the classic instance" of liability based on the doctrine of the last clear chance, it was not proved that the driver of the vehicle that ran over and injured the plaintiff's animal had actual knowledge of the peril of the animal, or even of the presence of the animal; but, on the contrary, the evidence in that "classic" case tended to show the driver of the vehicle did not have actual knowledge of the peril of the animal that

was fettered in the road. We quote the following from the opinion in *Davies* v. *Mann*:

> "It appeared that the plaintiff, having fettered the fore feet of an ass belonging to him, turned it into a public highway, and at the time in question the ass was grazing on the off side of the road about eight yards wide, when the defendant's wagon, with a team of three horses, coming down a slight descent, at what the witness termed a smartish pace, ran against the ass, knocked it down, and the wheels passing over it, it died soon after. The ass was fettered at the time, and *it was proved that the driver of the wagon was some little distance behind the horses.* The learned judge told the jury that, though the act of the plaintiff in leaving the donkey on the highway so fettered as to prevent his getting out of the way of carriages traveling along it, might be illegal, still, if the proximate cause of the injury was attributable to the want of proper conduct on the part of the driver of the wagon, the action was maintainable against the defendant; and if they thought the accident might have been avoided by the exercise of ordinary care on the part of the driver, to find for the plaintiff." (Italics ours.)

The jury, in that case, did find for the plaintiff, and the verdict was affirmed.

It is seen that liability of the defendant in that classic case did not depend at all upon the defendant's having actual knowledge of the peril, or even of the presence, of the animal the plaintiff had negligently left fettered in the road, and that "it was proved that *the driver of the wagon was some little distance behind the horses,*" so that it was probable he did not

actually see the animal in the road at all until his wagon was upon it. But the defendant was held liable in that case because he was "unaware of it (the peril) only through carelessness," as was said by this court in the Ellzey case, *supra.*

Not only does the evidence in this case prove that Conductor DeMaine, if not aware of the peril of Engineer Simpson was "unaware of it only through carelessness," but it proves that the conductor must have actually discovered Simpson's peril in ample time to have stopped the train, or permitted it to be stopped, and avoided the collision. Conductor DeMaine had received order No. 104 when his train left Pine Bluff that morning, which told him to hold his train at McNeil until train 18 arrived. He knew no other order had been received permitting his train to proceed beyond McNeil, unless it was the order he received at McNeil. He knew only one order had been received at McNeil. That order directed his train to meet Second 18 at Stamps. That order, doubtless, misled him at first, just as it misled Engineer Simpson, into the belief that it referred to train 18, instead of Second 18; but the two brakemen, in the caboose with him, just as the train was moving out from the side track at McNeil, both reminded the conductor that, unless he had received some order on train 18 there, they had no right to leave the siding at McNeil, and the conductor told them only one order had been received at McNeil and it referred to Second 18 and not to train 18, and both of his brakemen then urged him to stop the

train, as it was going onto the main line against order 104, which required them to wait there for train 18. The conductor had the one and only order received at McNeil then in his hand, and he already knew that order 104 required him to hold his train at McNeil until 18 arrived, and, having in his hand the only order received at McNeil and having discussed it with his two brakemen, he knew it did not relate to train 18 at all and he, therefore, knew that his train was proceeding in violation of order 104 and that there was danger of a collision with train No. 18, unless he stopped his train, or permitted his brakeman to stop it. The evidence affirmatively showing that Conductor DeMaine had seen all the orders received by his train that day and the evidence also showing that one of these orders commanded him to hold his train at McNeil until No. 18 arrived, it is certain the conductor had actual knowledge, when he allowed his train to leave McNeil, that Engineer Simpson was in peril; and, in addition, both of his brakemen forcibly reminded him that the train was proceeding in violation of orders and in imminent danger of collision with train 18, and they urged him to pull the air in the caboose and stop the train, and Brakeman Dorman started to pull the air himself, but the conductor refused to permit him to do so. With all this knowledge already in his possession and with both his brakemen pleading with him to pull the air and stop the train or let them do so, he refused to do either, but called for his general orders from the cupola and stood looking at them from the

time the train started moving toward the main line until it had gone out onto the main line and more than a mile down the main line to where the collision occurred. The fact that he decided to examine fifteen or twenty orders before he acted, when he knew only one of them concerned his duty at McNeil and it told him to hold his train there for No. 18, and after both his brakemen had so reminded him, does not prove he did not know the perilous situation, but simply proves his failure to exercise reasonable care to avoid the collision after discovering the danger of it. The conduct of his two brakemen affords a standard for comparison in determining whether the conductor exercised ordinary care to save the men on the engine from death after he discovered their peril. The conductor had a better opportunity to discover the danger of the situation than his brakemen, for he had in his own hand the only order received at McNeil, the only order that could have given him any right to proceed before the arrival of train 18; and yet both these brakemen discovered the peril of the situation and pressed that knowledge upon the conductor and urged him to stop the train; he ignored their pleadings and refused to act or let them act to avoid the collision until his train had crept past the switch and gone more than a mile down the main line to where the collision occurred. His failure to act with the facts before him caused the collision and was not the conduct of a reasonably prudent man.

This negligence of the conductor not only violated his duty as prescribed by law under the doctrine of the

last clear chance, but it was a flagrant violation of his duty under rule 107 of the railroad company, which says: "In case of doubt or uncertainty, the safe course must be taken" (R. 84).

On pages 8 and 9 of said reply brief, counsel say: "The last clear chance doctrine does not apply where, as here, the engineer's negligent conduct continued with that of the conductor to the time of the collision."

In reply to this contention, we say that the negligent act of Engineer Simpson consisted of his misinterpreting the order received at McNeil, which directed them to meet *Second* 18 at Stamps. He undoubtedly misunderstood that order to mean for them to meet train 18 at Stamps. That act of negligence was committed when Simpson misinterpreted that order; and his train was then on the side track at McNeil. His proceeding onto the main line toward Stamps was not, in itself, an act of negligence. Such action would have been proper if the order received at McNeil had been what Simpson understood it was; so that Simpson committed only one act of negligence and that act was his misinterpretation of the order received at McNeil, and that act was committed when the order was received at the station at McNeil. And, therefore, Simpson's negligence did not continue to the time of the collision.

If it be argued that his presence on the main line when the collision occurred when he had no order permitting him to be there was itself an act of continuing

negligence, we answer that if recovery by plaintiff be denied on this ground then on the same ground recovery can be defeated in every case where the doctrine of the last clear chance is invoked and that doctrine will be completely destroyed, for, unless the person injured continues in the place of peril until the time of the injury he will not be injured in any case. It is only in cases where the party injured continues to occupy his perilous position until the occurrence of the injury that an injury can occur. If he himself discovers his own peril and corrects his error and gets out of his perilous situation before the injury has happened to him, then, of course, there will be no injury, and, hence, if it be held that the fact the injured party continues in his perilous position up to the time of the injury will defeat recovery, then it is obvious there could never be a recovery under this doctrine.

In *Inland & Seaboard Coasting Co.* v. *Tolson,* 139 U. S. 551, this court said:

> "But upon the question of the plaintiff's position and attitude the evidence was conflicting; and it was indisputable that the steamboat was approaching the wharf at his call, and for the purpose of receiving freight from his hands, and that her pilot and officers saw him as he waited on the wharf. The jury might well be of opinion that, while there was some negligence on his part in standing where and as he did, yet that the officers of the boat knew just where and how he stood, and might have avoided injuring him if they had used reasonable care to prevent the steam-boat from striking the wharf with unusual and unnecessary

violence. If such were the facts, the defendant's negligence was the proximate, direct, and efficient cause of the injury."

In the Tolson case, *supra*, the negligent act of the person injured consisted in his placing himself in the position too near the edge of the wharf; and this court permitted him to recover, notwithstanding he continued in that position until the very time the boat struck the wharf and injured him. Then why should a recovery be denied in this case on the ground that Simpson continued on the main line until the collision occurred?

In the case of *Davies* v. *Mann, supra,* the act of negligence on the part of the plaintiff consisted in his turning his fettered animal onto the highway. He continued to leave his said animal still fettered upon the highway until the very moment when it was run over and killed by the defendant's wagon; yet, the court did not hold in that case that because the plaintiff continued to leave his animal in the place and condition in which his negligence had put him, the plaintiff could not recover for his injury.

If it be held in this case that the fact that Engineer Simpson continued on the main line, where it was negligence for him to go, until the collision occurred, defeats the right of his widow to recover for his death, then the English court was wrong in not holding in the case of *Davies* v. *Mann* that the fact the plaintiff in that case continued to leave his donkey fettered in the highway until the defendant's wagon

ran over it, did not defeat the plaintiff's right to recover for the death of the donkey, and this court was wrong in holding in the case of *Inland & Seaboard Coasting Co.* v. *Tolson, supra,* that the fact Tolson continued to stand too near to the edge of the wharf, where it was negligence for him to go, until the collision of the boat with the wharf occurred, did not defeat Tolson's right to recover for the injury to his foot.

On page 8 of said reply brief, counsel quote from the opinion of this court in the Ellzey case, *supra,* as follows:

> "The respondent and Merchant were engaged in a common venture, which, acting together, they were carrying on in a careless manner. In such a case their courses of conduct are not sufficiently independent to let it be said that either one or the other had in fact a later opportunity to avoid the consequences of their joint negligence."

And then counsel say that "the conduct of the engineer and the conduct of the conductor were not sufficiently independent to let it be said that either the one or the other had, in fact, a later opportunity to avoid the consequences of their joint negligence." But there is no similarity whatever between the facts in the Ellzey case, thus cited by counsel, and the facts in this case. In the Ellzey case, the man who was injured and the man whose negligence was alleged to have caused his injury were riding together in a motor car. They were in immediate contact with each other. All that either knew regarding the peril was also known to the other, or could readily and easily have been

made known to him. But such was not the situation of Engineer Simpson and Conductor DeMaine in this case. Simpson was on the engine at the front end of the train, while Conductor DeMaine was in the caboose at the rear end of the train. There were 43 box cars between them. It is true that each had a copy of the order they had received at McNeil, telling them to meet *Second* 18 at Stamps. Each had, doubtless, misread the order, when first getting it, as referring to train 18 instead of Second 18. Simpson then put the order in his pocket, where it was found after the collision; and never discovered his error until the collision occurred. But DeMaine kept this order in his hand and reread it and did discover that it did not refer to train 18; and both of his brakemen, in the caboose with him, forcibly reminded him, after they all saw that Simpson had been misled by the order and was pulling out onto the main line, that they were going against orders, and urged the conductor to pull the air and stop the train; and Brakeman Dorman started to pull the air himself and stop the train, but was ordered by the conductor not to do so.

If the conductor and his two brakemen had been in the engine cab with Engineer Simpson, so that Simpson could have had the same opportunity to discover his error in misreading the order that the conductor had, then this case would have been similar to the Ellzey case, cited by counsel; but Simpson did not have this opportunity to discover his error, which it is undisputed the conductor did have, and, hence, the

holding of this court in the cited case does not apply to the facts in this case.

Since Conductor DeMaine and Engineer Simpson were at the opposite ends of a long train and the conductor was in possession of a vital fact of which Engineer Simpson was ignorant,—that the order received at McNeil did not refer to train 18 but to *Second* 18, and that they were out on the main line in imminent peril of colliding with train 18— it cannot be said in this case, as contended by counsel, that Conductor DeMaine did not have an opportunity to avoid the consequences of the misreading of the order by Engineer Simpson.

In conclusion, we submit that the evidence in this case proves that respondent was entitled to recover under the humanitarian doctrine of the last clear chance, and that the judgment should be affirmed.

Respectfully submitted,

FRANK PACE,
*Counsel for Respondent.*